IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 837 of 1980

with

CROSS OBJECTION No 340 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

M.H.RALL,SINCE DECD.THROUGH HIS HEIRS AND L.RS.

Versus

THE STATE OF GUJARAT.

Appearance:

1. First Appeal No. 837 of 1980
MR JS PATEL for Appellants
MR KC SHAH, AGP for Respondent No. 1

2. CROSS OBJECTIONNo 340 of 1998
MR JS PATEL for Appellants
MR KC SHAH, AGP for Respondent No. 1

CORAM : MR.JUSTICE R.K.ABICHANDANI and

MR.JUSTICE C.K.BUCH

Date of decision: 08/03/99

ORAL JUDGEMENT [PER: C.K.BUCH, J]

The appellant-original plaintiff seeks to challenge the judgment and decree dated 19.9.1979 passed by the learned City Civil Judge, Court No.16, Ahmedabad in Civil Suit No. 258/98 partly allowing the claim of the appellant for the amount of Rs.27,515.44 p. with interest at the rate of 6% p.a. from the date of the suit till realisation. The respondent State of Gujarat has also filed above-numbered cross-objections challenging the impugned judgment and decree. The suit filed by the plaintiff was for Recovery of Rs.1,58,765.01 with running interest at the rate of 12 % p.a. from 1st July, 1965 along with other reliefs.

We are today obliged to decide the dispute between the Government contractor and the State. The original plaintiff M.H.Rall is no more and heirs and legal representatives of original plaintiff- contractor are fighting this battle to get the amount for the work done by their father/husband. For the sake of convenience, we have addressed the appellant as the plaintiff and the respondent State of Gujarat as the defendant.

Original plaintiff filed the suit being Civil Suit No. 258/69 in City Civil Court at Ahmedabad. It is on record that prior to the suit, the plaintiff had preferred one suit against the defendant and had obtained ad-interim injunction as the contract to construct the building in question was terminated and pending that suit, the defendant State again entrusted the same work to the plaintiff contractor and the plaintiff completed the rest of the work. Plaintiff had filed similar Civil Suit bearing No : Civil Suit No : 230 / 86 and the same was withdrawn conditionally. When the present suit was filed in City Civil Court, Ahmedabad, the process of recovery of the amount due and payable by the government, initiated by the plaintiff contractor was under progress with the department and, therefore, one of the prayer in the suit filed by the plaintiff is for settlement of accounts for the bills which were pending with the government. We are taken through the entire plaint and written statement (Exh. 10) by the learned counsel appearing for the parties.

The say of the plaintiff before the trial Court was that his contract was wrongly terminated and, therefore, the order of recession of the contract passed

by the Supdt. Engineer, PWD, Ahmedabad Circle, Ahmedabad and subsequent actions taken there under should be declared illegal, void etc. The alternative prayer of the plaintiff contractor was that he should be awarded compensation for illegal termination of the contract, for the extra work carried out by him and for other losses such as loss of business and loss of future business etc. In short, the plaintiff has claimed an amount of Rs. 1,57,648-72 ps. from the defendant State including the notice charges of Rs. 151/ which was spent to serve statutory notice under sec.80 of the CP Code prior to the filing of the suit in City Civil Court. The plaintiff has bracketed the amount which he has claimed under the alternative relief and the same are reflected at page nos. 36 to 48 of the plaint according to the paper-book and this claim is divided into four different schedules. Schedule-A narrates the loss sustained by the contractor against the tender items, schedule-B narrates the amount of claim for the work which was carried out as extra work undertaken by him as per the instructions of the concerned officer and change in plan of construction.Schedule-C narrates the claims for the extra work where the rate and the quantity of work was under dispute between the parties and Schedule:D talks about other items namely refund of security deposit, rent paid by the contractor for the road-roller, difference in amount against the material used which was calculated in terms of Tones and not in Metric Tones etc. As the defendant State did not respond to the notice served under sec.80 of the CP Code, the above-referred suit was filed. It is the say of the plaintiff that he is entitled to the suit amount with running interest at the rate of 12% from 1st July 1965 and the date on which he agitated his claim for the first time before the defendant State. It was the say of the plaintiff that the original structure which was to be constructed was for Post & Telegraph Office,Railwaypura, in the city of Ahmedabad and said work was given to him under a tender contract and the agreement was entered into by the Executive Engineer in the month of July 1962. The acceptance of the tender was communicated to the plaintiff vide a letter dated 16.7.1962 and the total work which was given to the plaintiff was for the amount of Rs. 3,37,908-59 ps. It was the say of the plaintiff that when the construction work was going on, an old building which was immediately adjacent to the building site had collapsed and because of other reasons mentioned in the plaint, it was not possible for him to complete the work as per the time stipulated in the terms of the contract i.e. tender agreement. The period was extended by the defendant state and when the plaintiff was

progressing well, substantial change was made in the plan, and he was ordered to carry out certain extra work and was asked not to erect entire one floor i.e. third floor. According to the plaintiff, because of the circumstances beyond his control, it was not possible for him to complete the work in time and substantial amount was not paid to him even as per tender agreement and so he could not complete the work and, therefore, the dispute between the plaintiff and the defendant cropped up for the first time and the plaintiff was compelled to approach the Court of law for ventilating his grievances. The suit of the plaintiff was resisted by the defendant State and the State has denied the allegations made by the plaintiff contractor in the plaint and has submitted that though all opportunities were given to the plaintiff, he failed in completing the work in time. The contractor was paid regular bills and though the correct measurements were taken by the officers of the defendant State, the contractor has never tried to pay any heeds to the instructions given by the department from time to time. Some of the averments made by the plaintiff in the plaint have been admitted fairly by the State in the written statement exh.10, viz. alteration in the plan, increase in percentage of excavation where the building was to be constructed, extra work carried out by the contractor which can be said to be an extra work i.e. work out of the contract agreement etc. But according to the defendant State, the measurements shown by the plaintiff in his final bill and in the schedule attached with the plaint are wrong. According to the State, entire agreed amount was paid to the contractor and, therefore, the suit of the plaintiff should be dismissed. In some of the paras of the written statement exh.10, the defendant has categorically stated that some of the final bills are paid after proper on table negotiations with the contractor and the plaintiff has suppressed this material aspect from the Court. According to the defendant, extra items' bills in five groups totalling to Rs. 47,111-00 were prepared and the plaintiff was paid Rs. 43,830-43 ps. and balance was to be paid after competion of extra items work. The plaintiff failed in submitting the proper rate for the work of those extra items and the rates submitted by the plaintiff were high in some cases. Ultimately, for those extra items rate, the dispute as to quantity of the work was settled by a mutual agreement and though the plaintiff had signed this agreement, and though the plaintiff is paid accordingly, he has falsely claimed this amount under various items. According to the defendant, there was no delay on the part of the department in making payment of the plaintiff's bills nor the officers have delayed in

settling the claims as to extra items -rates thereof and, therefore, the plaintiff was not entitled to get such amount. However, even if he is held to be entitled to get such amount, even then he is not entitled to any amount towards interest thereon. Considering the nature of the dispute between the parties, the learned trial Judge framed various issues which are at exh.93 in the record of the trial Court.

During the course of oral submissions, the learned counsel appearing for the appellant-plaintiff has restricted his arguments to the claims of the plaintiff in respect of four related items and has submitted that the plaintiff does not press his claim so far as the rest of the items are concerned and, therefore, it is not necessary, to reproduce all the issues or, to discuss and deal with the same.

The defendant State has also filed cross-objections against the judgment and decree and the same are registered as Cross Objection No. 340/98. The learned AGP Mr. KC Shah has restricted his submissions for the claims which are argued before us by the learned counsel appearing for the appellant. According to Mr. Shah, the learned Trial Judge ought not to have awarded any amount and the suit ought to have been dismissed in toto. The trial Judge has committed an error in allowing the suit in part. Mr. Shah has argued that in view of the grounds taken up in the cross-objections as well as in reply, the claim of the plaintiff which is being pressed even before this Court under Item nos. 8, 13 of Schedule:A, Item no.2 of Schedule:B, Item Nos. 19, 22 of Schedule :C and Item nos. 1 to 5 of Schedule : D cannot be granted.

The learned counsel for the appellant Mr. J.S Patel has taken us through the judgment and has submitted that the findings so far as the above-referred items are concerned, are erroneous. On appreciation of the averments made in the plaint, written statement and evidence led by the parties so far as the amount claimed under aforesaid items, we find no merits in the case of the appellant plaintiff.

Now, we would discuss the claim made in in respect of aforesaid items, in light of the evidence on record, seriatim. The disputed item no.8 relates to the construction of Burnt Brick Masonry. According to Mr. Patel, there is error in measurement. Though the work was carried out for 21883.51 cft., the final bill was prepared as if the work was carried out only for 20583.79 cft. When it was pointed out to the learned counsel Mr. Patel that the learned advocate appearing for the plaintiff before the Trial Court had conceded to the

measurements mentioned in the final bill so far as item no. 8 is concerned, Mr. Patel has fairly conceded that there was no dispute as to the rate applicable to this work and the contractor was paid as per tender rate Rs. 150 ps. per 100 cft. It is true that in the final bill, so far as item no.8 is concerned, work admeasuring 14333.86 cft. is shown to have been done. However, the contractor was paid for the work done earlier prior to the presentation of the final bill. The learned trial Judge after appreciating the evidence and submissions has accepted the claim to certain extent and the breakup given by the plaintiff in respect of five different items, are found acceptable. The learned Judge has rightly held that the breakup given by the plaintiff cannot be ignored in toto and full rate for the measurements shown in the final bill should be given to the plaintiff and, therefore, the plaintiff was entitled to the amount of Rs.30,000/, but as the plaintiff was already paid Rs. 27,430-62 ps., the plaintiff should be paid the rermaining amount i.e. Rs. 2569-38 ps. The dispute of the amount agitated by the plaintiff so far as item no.8 is concerned, was mainly based on the difference of quantity of work and not on the basis of the difference of rate and when the measurements shown in the final bill was accepted by the learned advocate appearing for the plaintiff before the trial Court, we do not see any merit so far as the grievance advanced before us against the finding recorded by the learned Trial Judge in respect of abovesaid item no.8. The learned Trial Judge has rightly applied the rule of thumb and determined the amount on the basis of undisputed facts. The learned counsel appearing for the appellant has not successfully convinced us that there is an error in recording a finding so far as the claim pertains to item no.8 is concerned.

The next submission of Mr. Patel was with regard to the payment made under claim of item no.13. Item no.13 relates to laying down of chequered cement tiles of 630.65 sq.ft. In the final bill, the measurement shown for this item is only 480.97 sq.ft. It is not the say of the plaintiff that he was paid less than agreed rate. Here also, the dispute relates only as to the measurement i.e. quantity of the work carried out by the plaintiff. After appreciating the evidence, the learned trial Judge has rightly observed that even in the plaint, the plaintiff came with a version that the government had only allowed him 334.52 sq.ft. and the evidence led by the plaintiff from the measurement book is contrary. According to the evidence available on record, the defendant State had accepted that the work of 480.87 sq.ft. was carried out. This figure is reflected in the

final bill. In para-19 of the judgment, the learned Trial Judge has observed that during the course of oral submissions Mr. Sukhawani, the learned advocate appearing for the plaintiff, has conceded that the government measurements shown in the final bill for the work of lying of chequered cement tiles should be accepted and in view of this admission of the learned advocate appearing for the plaintiff, the learned trial Judge awarded additional amount of Rs. 326.35 ps. which was found less even according to the measurement book maintained by the defendant State. A query was raised how and in what manner this finding can be said to be erroneous finding ? The learned counsel appearing for the plaintiff Mr. Patel had remained unsuccessful in replying the same. When a particular fact is admitted by the party before the trial Court and when there is no dispute as to the rate which is being paid in such type of cases, nothing more can be awarded. It is important to note that the plaintiff had failed in leading cogent and convincing evidence that he had laid chequered cement tiles admeasuring about 630.65 sq.ft. So the finding of the learned trial Judge so far as item no.13 is concerned, requires to be upheld and is hereby upheld.

So far as item no. 19 is concerned, it pertains to providing MS Reinforcement. The plaintiff has claimed amount for 1232.40 CWT while final bill granted was for 960.26 CWT. It is submitted by Mr. Patel that this mild-steel item is a concealed item and is to be gathered and found from the notes in the record book maintained by the State. According to Mr. Patel, though the defendant was asked to produce said record book, the defendant has suppressed this document and has not produced during trial and, therefore, adverse inference should be drawn against the State. Simultaneously,it should be observed that irrespective of this record book allegedly maintained by the State, the defendant has not led independent evidence as to the purchase and use of Mild Steel item during construction work of the building in question. It is on record that there was no order directing the defendant to produce the said record book. One measurement book was shown to the plaintiff during the course of his cross-examination and defendant has established that on some of the pages of said measurement book, the plaintiff contractor had put his signature. It is, however, noted by the learned Trial Judge that on some pages especially from page no.70 onwards, there was no signature of the plaintiff. The learned Trial Judge accepted the explanation given by the defendant State that because of the lapse of time, the department could not trace out that record book and, therefore, no adverse inference can be drawn against the defendant State. The

learned Trial Judge, in absence of cogent evidence, has rightly held that there is no clear evidence as to whether the plaintiff himself had also maintained any such book or account of Steel Consumption. In our view, it can be said on the basis of available evidence that so far as claim under Item No.19 is concerned, it is a very weak in nature and, therefore, figures arrived at by the plaintiff as to the use of such steel in the quantity of 1232.40 CMT cannot be accepted as a gospel truth and, therefore,the finding of the learned trial Judge does not require any interference. The learned trial Judge has rightly concluded that the difference of 13.60 tones may not be wholly correct, but there is difference of 10 tones of use of steel which was in possession of the contractor. There is no dispute regarding the rate of labour charges of Rs. 50/ CWT and the finding to award Rs. 6800/ to the plaintiff by way of an additional amount after appreciation of the evidence so far as the claim under item no.19 is concerned, seems to be justified. While appreciating the submissions of the learned AGP who had assailed this finding by way of cross-objections, we find that he was unable to point out any important part of evidence which can be said to have been remained uncontroverted and left out by the learned trial Judge without considering the same and thus the learned AGP has failed in uprooting the finding of the learned trial Judge so far as the claim under item no.19 is concerned. Under the circumstances, the argument advanced on behalf of the defendant State that claim under item no.19 ought not to have been allowed, is not worth accepting.Hence, said contention also requires tobe rejected.

Mr. Patel has submitted that the learned trial Judge has erred in appreciating the evidence available so far as the claim mentioned in item no.22 is concerned. This claim pertains to providing of B.C.T. flush doors to the constructed portion of the building. Mr.Patel has taken us through para-58 of the judgment and other relevant paras including para-83 where the learned trial Judge has discussed the evidence led by the parties pertaining to claim item no.22. It is on record that the contractor had remained in possession of the building till the building was handed over to the State. It is also on record that by filing the suit for prohibitory injunction, the contractor retained the possession and after completion, the building was handed over to the State. There is conflicting evidence as to whether watchman appointed by PWD was actually looking after the property under construction or not.The learned Trial Judge has appreciated the panchanama exh.90.This panchanama exh.90 is part of the report made by the

Deputy Engineer to the Executive Engineer wherein it is specifically mentioned that the plaintiff had withdrawn his watchman in view of the panchanama prepared by the government officer. The submission of the learned AGP Mr. Shah is that the learned trial Judge ought to have held that as the contractor was in possession, the loss sustained by the contractor even if some of the doors were taken away by some unknown persons, State should not have been fastened with the financial liability for such a loss. But the learned trial Judge has rightly held that there was a scramble for possession. At many stages, the Government itself has asserted that the government is holding possession of the property. So, the learned trial Judge has applied the rule of thumb and decided to award some amount to the contractor. The total amount claimed by the contractor under the head is Rs. 11,359-32 ps. It was satisfactorily established by the contractor that he was awarded nothing in final bill. Therefore, the contractor is awarded compensation of Rs. 5679-62 ps. i.e. half of the total amount claimed by the plaintiff. When a pointed query was raised to the learned AGP how he assails the finding of the learned trial Judge when he has awarded only 50% amount against the actual claim, submission of the learned AGP Mr. Shah was that the learned Judge has erred in holding that the property was in possession of the State and, therefore, it was not possible to ascertain as to who took away the property and, therefore, the State ought not to have been held responsible for the loss of flush doors etc. Looking to the rival contentions and nature of evidence available on record, in our view, the learned trial Judge has rightly applied rule of thumb and awarded 50% amount to the plaintiff. Hence, the finding in respect of the claim under item no.22 requires to be upheld.

Initially, the learned counsel Mr. Patel has submitted that he also wants to argue on some of the items reflected in Schedule:B, but during the course of arguments, after going through the some of the relevant paras of the judgment,mainly discussion on page 59 (para-32) and paras 60 onwards of the judgment, Mr. Patel has fairly conceded that he does not press the claims advanced under the items mentioned in Schedule: B. The learned AGP has also not submitted successfully that the cross-objections so far as the findings recorded in respect of the claims under items of Schedule :B are concerned, require interference. We have also gone through the relevant part of the judgment and looking to the evidence available on record, we are in agreement with the reasoning recorded by the learned trial Judge. We don't see any need to go into the detailed discussion as the learned counsel appearing for the appellant has

not pressed the appeal so far as the claims relating to items mentioned in Schedule : B are concerned. Hence, finding arrived at by the learned trial Judge to this effect is also upheld.

So far as the claims mentioned in Schedule:C are concerned, Mr. Patel has submitted that the interest charged at the rate of 6% p.a. can be said to be an erroneous decision and the plaintiff should have been awarded interest at the rate of 12% as prayed for. He has also submitted that because of breach of the contract by the defendant State, the plaintiff suffered substantial damage. He could not start new work elsewhere. As the government had failed in paying legitimate claim, his financial position was adversely affected and, therefore, the claim made under schedule:C should have been allowed by the learned trial Judge. The learned Trial Judge has appreciated the claim advanced by the plaintiff in detail. It is submitted by Mr. Shah, AGP that the interest awarded by the learned trial Judge is as per the prevailing rate of interest and in absence of any contract between the parties, the percentage of interest as claimed by the plaintiff, i.e. at the rate of 12% ,could not be awarded. Unless this Court finds that there is a material error in awarding and/or not awarding a particular amount, only then the same requires interference otherwise for the sake of awarding higher amount, the finding of the learned trial Judge should not be interfered with. The claim as to the future loss and profit is found baseless and the learned trial Judge has rightly rejected it. After going through the judgment, we find that the appreciation of the evidence by the learned trial Judge is consistent and in accordance with law. Nobody has pointed out any material error in procedure. It is also not the say of any of the counsel that extraneous considerations have played vital role prejudicial to any of the party.

During the course of oral submission, when attention of learned counsel Mr. Patel for the appellant was drawn to ground no.39 mentioned in the memo of appeal, after going through the said ground, has fairly submitted that he is not pressing the said ground and, therefore, same does not require to be dealt with. However, it is to be noted that the learned trial Judge before parting with the judgment, has frankly referred to the name of the Engineer who has assisted the Court who was present before the learned trial Judge at the time of final arguments in appreciating technical type of evidence. Even this ground ought not to have been taken by the appellant because the learned Trial Judge has specifically observed how and in what manner the concerned engineer Mr. Panwala had assisted the Court.

It is nowhere mentioned in the judgment that the presence of Panwala was objected by the plaintiff when his assistance was taken by the learned trial Judge. After going through the judgment, we feel that the finding has been recorded by the learned trial Judge independently and we do not find any shadow of influence with regard to the finding while appreciating technical type of evidence.The amount for which the suit of the plaintiff is decreed, by itself is significant. The suit of the plaintiff is partly allowed and the plaintiff was awarded Rs. 27153-44 ps. This shows that each and every item was meticulously considered and calculated and the smallest item of Rs.20/ and odd is also appreciated in view of the evidence available on record. So, it would be very much injudicious to say that the engineer who was present before the learned trial Judge has influenced the court against the plaintiff merely because he was serving with the government department. It is an experience of this Court and subordinate courts that on many occasions, when government officers or technocrats are called to assist the Court, they are assisting the Court objectively irrespective of the party before the Court. The learned AGP though had argued with all grounds mentioned in the cross-objection, after going through the judgment and reasoning given by the learned trial Judge, has submitted that there is no material error in so far as appreciation of evidence is concerned committed by the learned trial Judge. So, we do not find any merit either in appeal or in cross objection filed by the State and, therefore, we dismiss both.

No other contentions are raised.

In the result, the First Appeal as well as Cross Objections fail and both are hereby dismissed. The impugned judgment and decree dated 19.9.1979 passed by the learned City Civil Judge, Court No. 16, Ahmedabad in Reg. Civil Suit No.238/69 is hereby confirmed. We are not inclined to award costs to any of the parties. Normally successful party can be awarded costs of litigation but before us both have failed so no orders as to costs.

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